In The

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Supreme Court of the United States

October Term, 1972

No. 72-609

ANGELO KOKAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of Facts	3
Reasons for Granting the Writ	9
Point I. The failure of the Government to call petitioner's attention to a known prior inconsistent statement did not accord petitioner the necessary safeguard to protect him from punishment for mere lapse of memory.	9
Point II. The Decision and Findings of the Court of Appeals were not in accord with the Record.	11
Point III. Petitioner's testimony which was adjudged perjurious was not material to the issues in the action in which it was given.	17
Conclusion	20

Contents

Page

Table of Citations

CASES CITED:

American Communications Ass'n. v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950) 14

Galanos v. United States, 6th Cir., 1931, 49 F.2d 898 16

La Placa v. United States, 1st Cir., 1965, 354 F.2d 56 . . . . . 13, 15

People v. Harris, 102 Ill. App. 2d 335 (1968) 17

Smith v. United States, 6th Cir., 1948, 169 F.2d 118 16

United States v. Beach, 4th Cir., 1961, 296 F.2d 153 15

United States v. Cerone, et al., 7th Cir., 1971, 452 F.2d 274, cert. den. 405 U.S. 964 . . . . . 3, 4, 10, 11, 12, 14, 18

United States v. Hendrickson, 7th Cir., 1952, 200 F.2d 137 17

United States v. Laut, 17 F.R.D. 31 (1955) 18

United States v. Letchos, 7th Cir. 1963, 316 F.2d 481, cert. den. 375 U.S. 824. . 2, 9, 10

Contents

Page

United States v. Magin, 7th Cir., 1960, 280 F.2d 74 13

United States v. Moran, 2nd Cir., 1952, 194 F.2d 623 17

United States v. Nicoletti, 7th Cir., 1962, 310 F.2d 359 15

United States v. Parker, 7th Cir., 1957, 244 F.2d 943 17

United States v. Slutzky, 3rd Cir., 1935, 79 F.2d 504 17

United States v. Wall, 6th Cir., 1967, 371 F.2d 398 . . . . . 15, 17

United States v. Winter, 2nd Cir., 1965, 348 F.2d 204, cert. den. 382 U.S. 955. . . . 16

Weiler v. United States, 323 U.S. 606, 65 S. Ct. 548, 89 L. Ed. 495 (1945). 10

Young v. United States, D.C. Cir., 1954, 212 F.2d 236, cert. denied 347 U.S. 1015 14

STATUTES CITED:

18 U.S.C. Sec. 1621 3

28 U.S.C. Sec. 1254(1) 2

Contents

Page

APPENDIX

Appendix "A" — Decision 1a

Appendix "B" — Order 6a

In The

Supreme Court of the United States

October Term, 1972

No.

ANGELO KOKAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Angelo Kokas, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on August 4, 1972.

Opinion Below

The opinion of the Court of Appeals has not yet been reported. The opinion appears at Appendix "A". infra, pp. 1a.

Jurisdiction

The judgment of the Court of Appeals was entered on August 4, 1972. A petition for rehearing (Appendix "B", infra, pp. 6a) was denied by order dated September 19, 1972. This petition was filed within 30 days thereof. The jurisdiction of this Court is invoked under 28 United States Code, Sec. 1254 (1).

Questions Presented

Petitioner was convicted of perjury, in a bench trial, jury having been waived. He was charged with knowingly testifying falsely, in 1970, that he had not been present at a race track since 1963.

The questions thereby arising are:

1. Whether the government's failure to confront petitioner with a known prior inconsistent statement violated the safeguards pronounced by the Seventh Circuit in United States v. Letchos.

2. Whether the decision and findings made by the Court of Appeals were in accord with the record.

3. Whether petitioner's testimony, which was adjudged perjurious, was material to the issues in the action in which it was given.

Statute Involved

Title 18 U.S.C., Sec. 1621, provides:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States."

Statement of Facts

The indictment arose as a result of testimony given by petitioner in a trial which commenced April 20, 1970, entitled United States v. Cerone, et al., 7th Cir., 1971, 452 F.2d 274, cert. den. 405 U.S. 964. The government's principal witness in Cerone was one Louis Bombacino. He testified, in substance, that he met Frank Aureli, Donald Angelini (defendants in Cerone) and petitioner at Dominic's Pool Room and Barber Shop on July 2, 1965. According to Bombacino, Angelini told him that beginning with July 2nd, any wagers of $50.00 or more were to be called in to Aureli.

Petitioner said, "All right, if that's the way you want it." Bombacino also testified that Angelini told petitioner, "I know it's hard for you to go back and forth to the phone out at the race track."

Petitioner was called as a defense witness in Cerone pursuant to subpoena. On direct examination, no mention was made of whether or not petitioner had ever been at a race track.

On cross examination by Mr. Casey, the prosecutor, the following occurred:

> "Q. Have you ever spent in the past, Mr. K[illegible], any time at the race track? A. Have I ever spent in the past?
>
> Q. Yes, sir. A. I think 1963 was the last time I was at a race track.
>
> Q. Pardon? A. 1963 I believe is the last time I was at a race track.
>
> Q. Where was that? A. Where was it?
>
> Q. Yes.
>
> The Court: I don't think there is any need to repeat every question.
>
> The Witness: I don't hear too well. He holds his hand in front of his mouth.
>
> Mr. Echeles: (A defense attorney) I have the same difficulty.
>
> The Court: All right. Keep your voice up, Mr. Casey.
>
> Mr. Casey: All right.
>
> Q. What race track was the last one you were ever at? A. What race track?

Arlington Park, I believe, or Hawthorne. I don't remember which one." (Emphasis supplied.)

Later, upon examination of petitioner by Miss Lavin, the attorney for Angelini, the following occurred:

"Q. On July 2, 1965, did you have a conversation with Frank Aureli, Louis Bombacino and Donald Angelini at Dominic's Pool Room and Barber Shop? A. I never seen Donald there, so I never had a conversation with him, no.

Q. Well, at any time or at any place in the presence of the persons that I have mentioned, did you have substantially the following conversation with Donald Angelini where he told you that from here on any bets of $50 or more you were to call in to Frank Aureli, and you said, okay, Don, if that's the way you want it. And Mr. Angelini said I know it's hard for you to go back and forth to the phone out at the race track. A. No, that conversation never took place.

Q. Were you working at the track in any capacity in the year 1965? A. No ma'am.

Q. Were you at the track? A. I couldn't go out at the track, no.

Q. When was the last time you were ever at a race track? A. I believe it was 1963. I am not positive — 1963 the latest." (Emphasis supplied.)

The government, in rebuttal, called Horace B. Loomis, who testified that he saw petitioner at two race tracks (Maywood and Sportsman's) once in 1964 and twice in 1965, and upon each occasion, had ejected petitioner.

Another witness on rebuttal, John L. Madala, testified that he saw the petitioner in the security office at Hialeah Race Track on January 31, 1966, as well as a few days later, and that petitioner was there also ejected.

On May 19, 1970, an indictment was returned against petitioner charging him with perjury. The indictment reads, in pertinent part, as follows:

> "3. During the course of the [Cerone] trial, it became material for the Court and Jury to learn whether or not Angelo Kokas, defendant herein, had been present at race tracks during the years 1964, 1965 and 1966.
>
> 6. On April 30, 1970, at Chicago, in the Northern District of Illinois, Eastern Division,
>
> ANGELO KOKAS,
>
> the defendant herein, during the course of said trial, while testifying under the aforesaid oath, did then and there wilfully, knowingly and contrary to said oath, state a certain material matter which he did not believe to be true, and more particularly as follows:

> On April 30, 1970, the defendant Angelo Kokas testified, in substance, that he had not been present at a race track since the year 1963 at the very latest.
>
> 7. The said testimony of Angelo Kokas, defendant herein, was false, as the defendant then and there well knew, in that he had, in fact, been present at race tracks in the years 1964, 1965 and 1966." (Emphasis supplied.)

At petitioner's trial, FBI Special Agent Shanahan testified that he had dispatched Special Agent Rohmer — some nine months before the Cerone trial — to serve a subpoena on petitioner. Rohmer told Shanahan that during a conversation with petitioner at that time, petitioner complained of having been ejected from Hialeah in 1966. Shanahan testified further that he was present at the Cerone trial, that he heard petitioner testify and at that time was aware of petitioner's discussion with Rohmer about being ejected from Hialeah in 1966. Shanahan conceded that he had informed the prosecutor in Cerone about the petitioner's discussion with Rohmer after petitioner had testified.

During the Cerone trial, no attempt was made by the prosecutor to direct petitioner's attention to the matter later presented in rebuttal to give petitioner an opportunity to correct what may have been a mere misunderstanding or lapse of memory — notwithstanding the fact that during the trial, the prosecutor had been informed of the apparent inconsistency — i.e., that he had discussed with Rohmer the occasion of being ejected from Hialeah in 1966.

The Court of Appeals, in affirming petitioner's conviction, set forth in its opinion petitioner's testimony in Cerone which formed the basis of his indictment and conviction. Significantly, midway through such recitation, there appear three asterisks (". . ."), followed by the Court's finding that:

> "The care of the appellant in repeating questions and his specific answers to specific questions contraindicates any ambiguity." (Emphasis supplied.)

What the Court omitted (". . .") was the colloquy between the trial judge, petitioner, the prosecutor and a defense attorney which reveals that the reason petitioner repeated the questions before answering was that he could not hear the questions.[1]

The Court of Appeals also found that this case is not one in which "the government" was in possession of prior inconsistent statements made by a witness, and held that it was unpersuaded by petitioner's assertions, (1) that he would not have considered himself to have been "on the tracks" unless he were in a position to place wagers,

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1. "The Court: I don't think there is any need to repeat every question.

The Witness: I don't hear too well. He holds his hand in front of his mouth.

Mr. Echeles: I have the same difficulty.

The Court: All right, keep your voice up, Mr. Casey.

Mr. Casey: All right."

and (2) that in any event, his answers prefaced or conditioned by "I believe", "I don't remember", or "I am not positive" are not absolute statements of fact and should not be equated with positive statements of fact, statements which a declarant knows to be untrue.

Reasons for Granting the Writ

The petitioner urges that the Court of Appeals in this case has made findings not in accordance with the record and has decided certain of the questions raised in a way which is in conflict with the decisions of this Court and with the decisions of other Courts of Appeal, and has decided important questions of federal law which have not been, but should be, passed upon by this Court. The questions raised by this petition are segregated in the points which follow:

Point I

THE FAILURE OF THE GOVERNMENT TO CALL PETITIONER'S ATTENTION TO A KNOWN PRIOR INCONSISTENT STATEMENT DID NOT ACCORD PETITIONER THE NECESSARY SAFEGUARD TO PROTECT HIM FROM PUNISHMENT FOR MERE LAPSE OF MEMORY.

The Court of Appeals, in failing to apply the principles it set forth in United States v. Letchos, 7th Cir., 1963, 316 F.2d 481, cert. den. 375 U.S. 824, has undermined and violated the rights of all defendants faced with perjury charges. Its decision permits the government to sit idly by when its representatives have actual knowledge

of a witness' prior inconsistent statement and allow an error of fact to remain uncorrected and thereafter serve as the basis of a perjury indictment.

Petitioner urges that his perjury conviction cannot stand because of the government's failure to pinpoint his attention to the inconsistency known to it. United States v. Letchos, supra; Weiler v. United States, 323 U.S. 606, 65 S.Ct. 548, 89 L. Ed. 495 (1945).

Petitioner, who was not questioned on direct examination about his presence at race tracks, was confronted, on cross examination, with a general inquiry on the subject. His answers — which obviously were his best recollection — were heard by Agent Shanahan (the agent in charge of the Cerone case), who sat in the courtroom as a government agent. At that time, Shanahan knew of petitioner's July, 1969 conversation with Agent Rohmer, yet waited until after petitioner testified to so inform the Cerone prosecutor. Petitioner was not recalled to the stand nor was the court informed that the government was aware of an inconsistency concerning petitioner's testimony.

The government clearly was in possession of an inconsistent statement made by petitioner to Rohmer, a government agent who was acting in his official capacity when same was uttered to him. Another government agent, Shanahan, was aware of the inconsistency while petitioner was still

under oath. Still, no opportunity was afforded to petitioner to recall such event so as to have the opportunity to correct a mere lapse of memory.[2]

Point II

THE DECISION AND FINDINGS OF THE COURT OF APPEALS WERE NOT IN ACCORD WITH THE RECORD.

Petitioner contended below that his Cerone testimony was given with reference to Arlington Park Race Track, from which, the record reveals, he had been barred since May 13, 1963, and which was the only pertinent functioning daytime track operating from June 25, 1965 to July 2, 1965 — the time frame involving Bombacino's testimony.

The Court of Appeals, after setting forth petitioner's pertinent Cerone testimony (without the vital colloquy set forth in footnote 1, supra), made its initial and, we submit, most significant finding, that:

> "The care of [petitioner] in repeating questions and his specific answers to specific questions contraindicates any ambiguity."

The Court below was incorrect in concluding that petitioner's repetition of the questions was due to "care" (implying that he was super-careful in giving

2. In light of the fact that the rebuttal witnesses were on the stand the next day, it strains credulity to accept the government's position, urged below, that it was not in possession of the information offered on rebuttal while petitioner was testifying.

his answers). The truth is simply that he could not hear the questions — a predicament affecting defense counsel, Mr. Echeles, also. Had the Court below considered the colloquy (which appeared in petitioner's Cerone testimony attached to his brief), it could not have ascribed petitioner's actions as being prompted by "care".

Furthermore, petitioner is at a loss to understand, in light of his Cerone testimony set forth in the Court of Appeals' opinion — the very testimony which is claimed to be perjurious — how the Court could find that he made "specific answers". For each answer (except two not involved in the alleged perjury), petitioner conditioned same with the words: "I think", "I believe" or "I am not positive".[3] Clearly, his answers were not statements of definitive facts — expressions upon which a perjury conviction may rest.

Assuming arguendo, that in the case at bar, there exists competent proof of petitioner's "presence" at race tracks after 1963 — there was no proof that petitioner did not "think", did not "believe", or was "positive" about the answers he gave in Cerone.

In other words, if a witness under oath is asked: "What was the color of that traffic light?" and he answers: "I believe the light was red", he cannot be convicted of perjury upon testimony

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3. Petitioner was testifying in 1970 about events occurring as far back as 1963.

that the light, in fact, was green. It would have to be established that the witness did not believe the light was red, but wilfully testified it was. Furthermore, in the case at bar, the Cerone prosecutor did not challenge petitioner's conditional answers ("I believe", etc.) in an effort to obtain unconditional answers.

It is well settled that perjury prosecutions are of a different breed than other criminal cases. As stated by the Court in United States v. Magin, 7th Cir. 1960, 280 F.2d 74, 76:

> "The degree and character of proof required in a perjury prosecution is different than in an ordinary criminal case. It is clear that there are two essential elements of proof. First, statements made by the defendant must be proven false. Secondly, it must be proven that the defendant did not believe these statements to be true." (Emphasis supplied.)

In La Placa v. United States, 1st Cir., 1965, 354 F.2d 56, the defendant was a witness at the trial of one Fagundes. He testified that he remembered "very well" the day and time when he saw Fagundes at a courthouse (as opposed to the government's contention that at the same time, Fagundes was robbing a bank somewhere else). Two witnesses at La Placa's perjury trial testified to the objective falsity of La Placa's testimony. La Placa contended that, at best, assuming he was incorrect as to the objective facts (the date and time) to which he had testified, he had merely made an innocent mistake.

The Court, in affirming La Placa's perjury conviction, held that while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does — and La Placa said that he remembered the events "very well". American Communications Ass'n. v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1950); Young v. United States, D.C. Cir., 1954, 212 F.2d 236, cert. denied, 347 U.S. 1015.

In the case at bar, there is nothing in the record pointing to anything petitioner said or did which would justify the conclusion that at the time he gave his Cerone testimony, he did not believe his answers to be true. There was no proof that petitioner actually remembered the facts to which he testified and that he knowingly made false statements. As stated by the Trial Court, for petitioner to be found guilty of perjury:

> "He must have had a chance to face the issues squarely. Second, when so faced, he must be found to have deliberately lied or misspoken at a time when he should have known he was misspeaking."

The trial judge, after stating that he had "read and re-read" the alleged perjurious testimony, concluded that he "cannot convince myself that the defendant did not know that he was being asked whether he had attended any tracks since 1963" and that [petitioner] "said plainly, simply and, I am of the opinion, knowingly, that he had not been at the track, a track, or any track, since 1963".

The above conclusion of the Trial Court, as well as the similar conclusion of the Court below demonstrates that the issue of what petitioner actually said was not broached — i.e., did he say he was not at the track, or did he say he was not positive and it was his belief he was not at the track since 1963. No reason was put forth by either Court to show that he did not so believe. La Placa v. United States, supra. Petitioner did not testify that he was familiar with or remembered all the times he was ever at race tracks or that he recalled the events some seven years prior — he repeatedly testified that he was not positive, did not remember, but believed he was not at the track since 1963.

In United States v. Nicoletti, 7th Cir., 1962, 310 F.2d 359, the Court found that Nicoletti's memory was "good" while he was testifying in aid of an associate's defense, but that his memory "suddenly failed when faced with cross-examination". Again, there has been no such similar finding here as concerns petitioner. Here, on direct examination, petitioner was not even questioned about his presence at any race tracks. United States v. Beach, 4th Cir., 1961, 296 F.2d 153.

The essence of perjury, as defined in the statute, is the belief of the witness concerning the veracity of his testimony. Where a defendant, under oath, in response to a question asked of him, gives an answer which is literally accurate, technically responsive or legally truthful, he cannot be convicted lawfully of perjury. United States v.

Wall, 6th Cir. 1967, 371 F.2d 398; United States v. Winter, 2d Cir. 1965, 348 F.2d 204, cert. denied, 382 U.S. 955; Smith v. United States, 6th Cir. 1948, 169 F.2d 118; Galanos v. United States, 6th Cir. 1931, 49 F.2d 898.

We respectfully submit that in the case at bar, petitioner's answers were literally accurate, technically responsive, and legally truthful. The proof shows that petitioner was ejected upon each appearance at the track. In light of the Trial Court's findings that:

> "Mr. Kokas is not a man of great education and that his answers should be interpreted in the light of his background and understanding of the questions,"

and that:

> "The questions asked and the testimony given must be interpreted in a light most favorable to the defendant,"

it cannot be blithely assumed that petitioner would consider himself "at the tracks" if he were not in a position to go into the tracks and place wagers.

Finally, there was no evidence at petitioner's trial to show what the questions meant to petitioner. In a case where the question propounded admits of several possible meanings to the one being interrogated, his belief cannot be adequately tested and it is necessary to determine what the question meant to him when he gave the disputed answer. In the absence of such

evidence, no determination can be made as to the falsity of the answer and thus, no conviction for perjury can be based on that answer; United States v. Wall, supra.

Point III

PETITIONER'S TESTIMONY WHICH WAS ADJUDGED PERJURIOUS WAS NOT MATERIAL TO THE ISSUES IN THE ACTION IN WHICH IT WAS GIVEN.

"Materiality of the defendant's utterances . . . is an indispensable element of statutory perjury." United States v. Parker, 7th Cir., 1957, 244 F.2d 943, 950. The alleged false statement must be material to the issues confronting the tribunal at which it is given. That is to say, the testimony must have the natural effect or tendency to influence or dissuade the tribunal. United States v. Moran, 2d Cir., 1952, 194 F.2d 623; United States v. Hendrickson, 7th Cir., 1952, 200 F.2d 137. "The phrase 'material matter' as used in the statute referring to perjury . . . refers to testimony that will legally evidence the propositions to be proved." United States v. Slutzky, 3rd Cir., 1935, 79 F.2d 504, 506.

"A statement can be neither material nor immaterial in itself, but its materiality must be determined in accordance with its relation to some extraneous matter. *** Materiality looks to the relationship between the propositions for which the evidence is offered and the issues in the case." People v. Harris, 102 Ill. App. 2d 335 (1968). "Materiality" has been held to be

synonymous with "important", rather than mere relevance. A clear illustration of this occurred in United States v. Laut, 17 F.R.D., 31, 34 (1955), where the defendant was indicted for stating in 1951 that the answers he gave at a 1950 naturalization hearing were true. The Court pointed out that at the 1950 hearing, he had been asked 250 questions of the broadest form, many of them having no relation to the central issue of that hearing — whether he was a member of the Communist Party. It then held:

> "Even relevant questions, moreover, may lack that 'substantial degree' of importance needed to make them material."

In the case at bar, we submit, the Cerone prosecutor's interrogation of petitioner as to whether he was "at" race tracks was immaterial to the issues before the Cerone jury.

Bombacino testified that he met petitioner and others at a specific place on a specific date in 1965. In addition, Bombacino testified to a conversation in petitioner's presence. Bombacino, the government's chief witness, was not questioned, not did he testify about any specific instances during which petitioner was "at" a race track.

Petitioner, called a defense witness, denied participating in the conversation testified to by Bombacino. He was not questioned on his direct examination as to whether he was ever "at" a race track subsequent to 1963. Thus, at this point, no issue as to petitioner's presence "at" race tracks was raised. While petitioner agrees

that Bombacino's credibility and petitioner's credibility were thrown open to the jury, the question of whether petitioner was in fact "at" a race track subsequent to 1963 was collateral to the issue of whether or not a meeting took place in 1965.

Petitioner was not on trial, nor was he a co-conspirator. Petitioner had no attorney present who could object to the cross-examination, which had no bearing on either Bombacino's testimony or upon petitioner's direct testimony.

Furthermore, it was not brought home to petitioner that the Cerone prosecutor considered this a material issue before the jury. Assuming arguendo, that petitioner was lying on the witness stand, the government, (in the person of Agent Shanahan — who is a member of the same Justice Department as the Assistant United States Attorney), possessed of knowledge of a prior inconsistent statement made by petitioner, did not deem it material enough to bring same into the open.

Instead, the government permitted such information to remain in the secret recesses of the minds of its agents and permitted petitioner's conditional testimony to stand. It is fair to conclude that had the government deemed petitioner's testimony material, it would have confronted him with his prior inconsistent statement while he was on the witness stand or recalled him to the stand to confront him with same. Instead, petitioner was indicted for perjury. It is respectfully urged that the test of materiality was not met by the subject utterances of the petitioner.

Conclusion

For these reasons, a writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX "A"

Decision

In the United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1971 — APRIL SESSION, 1972

No. 71-1633

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANGELO KOKAS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Case No. 70 CR 268

JAMES B. PARSONS, *Judge.*

ARGUED: MAY 24, 1972 — DECIDED: AUGUST 4, 1972

Before Mr. Justice CLARK*, KNOCH, *Senior Circuit Judge,* and KILEY, *Circuit Judge.*

KNOCH, *Senior Circuit Judge.* Defendant-appellant, Angelo Kokas, was convicted in a bench trial, jury having been waived, on an indictment charging him with perjury in violation of Title 18, U.S.C. §1621. This appeal followed. We affirm the conviction.

The circumstances briefly were as follows. In the trial of *United States* v. *Cerone, et al.*, No. 69 CR 555, *aff'd.* 7 Cir., 1971, 452 F.2d 274, *cert. den.* 405 U.S. 964, a prin-

* Associate Justice Tom C. Clark, United States Supreme Court, retired, is sitting by designation.

cipal witness for the government testified to a meeting on July 2, 1965, in the course of which Angelo Kokas was allegedly told to report by telephone all bets of $50 or more, and was also told, "I know it's hard for you to go back and forth to the phone out at the race track." The testimony included assertions that appellant was a bookmaker at the race tracks who was receiving instructions from some of the defendants in the *Cerone* case.

Appellant in direct examination, by counsel for one of the defendants in the *Cerone* case, denied that the above described meeting ever took place. During cross-examination by the government, appellant said that the last time he was at any race track was, at the latest, in 1963.

Later the government called a witness who testified to seeing appellant at the Maywood Park Race Track on September 24, 1964, at Sportsman's Race Track on April 21, 1965, and April 22, 1965, from which the witness had ejected appellant on each occasion. Another witness testified that he saw appellant in the security office at Hialeah Race Track on January 31, 1966, and a few days later at the track. There was evidence he was ejected there, too.

Appellant contends that the government should have laid a foundation for any perjury charge by inviting appellant's attention to the apparent inconsistency to give appellant an opportunity to correct what may have been a mere misunderstanding or lapse of memory.

It is appellant's view that the prior testimony so clearly referred to Arlington Park, that his answer most likely was made with that track alone in mind. His testimony on cross-examination reads in the transcript as follows:

"Q. Have you ever spent in the past, Mr. Kokas, any time at the race track?
"A. Have I ever spent in the past?
"Q. Yes, sir.
"A. I think 1963 was the last time I was at a race track.
"Q. Pardon?
"A. 1963 I believe is the last time I was at a race track.

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"Q. Where was that?
"A. Where was it?
"Q. Yes."

• • •

"Q. What race track was the last one you were ever at?
"A. What race track? Arlington Park, I believe, or Hawthorne. I don't remember which one."

The care of the appellant in repeating questions and his specific answers to specific questions contraindicates any ambiguity. Similarly, when questioned again on direct examination, by counsel for another defendant in the *Cerone* trial, the testimony reads in the transcript as follows:

"Q. Were you working at the track in any capacity in the year 1965?
"A. No, ma'am.
"Q. Were you at the track?
"A. I couldn't get out at the track, no.
"Q. When was the last time you were ever at a race track?
"A. I believe it was 1963. I am not positive. 1963, the latest."

We do not have before us a case in which the government is in possession of prior inconsistent statements made in a single prior interview by a witness as in *United States* v. *Letchos*, 7 Cir., 1963, 316 F.2d 481, *cert. den.* 375 U.S. 824, on which appellant relies. Here we are concerned with alleged conduct over a period of years.

Further, nothing in the record indicates that at the time that appellant was testifying, the prosecutor was in possession of the material later presented in rebuttal in the *Cerone* case or at the subsequent trial of appellant.

Appellant would have us infer that the apparent falsity of his statement must have been known to the prosecutor at the time he was cross-examining appellant in the *Cerone* trial because Special Agent Shanahan of the F.B.I. was present in the courtroom when appellant testified.

At appellant's trial, Agent Shanahan testified that he sent Agent Rohmer to serve a grand jury subpoena on appellant, and that Agent Rohmer subsequently reported having a conversation with appellant. This was some nine months before the *Cerone* trial. Agent Rohmer had told Agent Shanahan that in the course of that conversation appellant complained of having been ejected from the Hialeah Race Track in 1966. In the *Cerone* trial, as indicated, and at appellant's own trial, the government did produce a witness who testified to appellant's presence at Hialeah in 1966.

At appellant's trial, his counsel, in examining Agent Shanahan elicited testimony that he was present at the *Cerone* trial, that he heard appellant testify, and that he knew appellant had a discussion in July 1969 about "being thrown off the track in '66, in Hialeah." Counsel did not take the examination a step further and ask whether Agent Shanahan had communicated this information to the prosecutor prior to or while he was cross-examining appellant. The prosecutor, James Casey was available but was not called as a witness at appellant's trial to ascertain when this information came to his knowledge. However, on recross-examination Agent Shanahan was asked whether he had informed the prosecutor in *Cerone* about the conversation with Agent Rohmer after appellant had testified, and he said, "Yes, I did."

Appellant asserts that he would not have considered himself to have been "on the tracks" unless he were in a position to place wagers and collect winnings and he points out that the testimony referred repeatedly to his being ejected from the tracks where he was seen. He feels that this view is supported by the fact that he had been at Sportsman's Race Track early in 1970 (which he says he could not likely have forgotten so soon) in connection with labor negotiations for Local 25 of the Chicago Office, Theatre and Amusement Janitors Union, affiliated with Service Employees Union, AFL-CIO. He also notes that he used expressions such as "I believe," "I don't remember," and "I am not positive."

The District Judge considered these points and found them unpersuasive (as, incidentally, do we.) Judge Parsons

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said he could not convince himself that appellant did not know he was being asked whether he had attended any tracks since 1963, and found the conclusion inescapable that appellant said knowingly that he had not been to the track, a track or any track since 1963.

We see no reason to depart from the established rule that this Court will not reweigh the evidence or redetermine the credibility of witnesses. *United States* v. *Miles*, 7 Cir., 1968, 401 F.2d 65, 67; *United States* v. *Coduto*, 7 Cir., 1961, 284 F.2d 464, 466, *cert. den.* 365 U.S. 881.

The decision of the District Court is affirmed.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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APPENDIX "B"

Order

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

September 19, 1972

Before

Hon. WIN G. KNOCH, Sr. Circuit Judge

Hon. TOM C. CLARK, Assoc. Justice, U.S.S.C.

Hon. ROGER J. KILEY, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

No. 71-1633
ANGELO KOKAS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division (70 CR 268)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS ORDERED that said petition be and the same is hereby denied.